87-6431

NUMBER _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WAYNE T. SCHMUCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND MOTION FOR LEAVE TO

PROCEED IN FORMA PAUPERIS

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(CERTIFICATE OF SERVICE AND ENTRY OF APPEARANCE ATTACHED)

NUMBER _____

IN THE
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WAYNE T. SCHMUCK,
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PETITION FOR WRIT OF CERTIORARI

Petitioner, WAYNE T. SCHMUCK, by and through his attorney, Peter L. Steinberg, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit en banc entered in this matter on January 21, 1988.

A. QUESTIONS PRESENTED FOR REVIEW:

1. Was it error to deny petitioner's request for a jury instruction on odometer tampering, 15 U.S.C. § 1984, as a lesser offense "inherently related" to the charged offense of mail fraud, 18 U.S.C. § 1341, where the abundant references to petitioner's odometer tampering may have influenced the jury to convict him of mail fraud in a weak case, Keeble v. United States, 412 U.S. 205 (1973), United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971)?

2. Was it error to deny petitioner's motion for judgment of acquittal on the charges of mail fraud where the mailing of automobile title documents by the subsequent purchasers of the automobiles in which petitioner had rolled back the odometers were actually counterproductive to his odometer tampering scheme, or at most were routine mailings tangentially related to his scheme, and not in furtherance thereof, United States v. Maze, 414 U.S. 395 (1974), United States v. Tarnopol, 561 F.2d 466 (3rd Cir. 1977)?

B. PARTIES:

All parties to the proceedings appear in the caption of this petition.

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D. REPORTED OPINIONS BELOW:

This case was initially reported in a panel decision as United States v. Schmuck, 776 F.2d 1368 (7th Cir. 1985). The panel decision was vacated and rehearing en banc was ordered, United States v. Schmuck, 784 F.2d. 846 (7th Cir. 1986). The en banc decision, which petitioner seeks to have reviewed, was issued January 21, 1988, and is reported as United States v. Schmuck,_____ F2d. _____ (7th Cir. 1988).

E. JURISDICTIONAL STATEMENT:

The Judgment Order on Rehearing of the United States Court of Appeals for the Seventh Circuit, reversing the panel decision and affirming petitioner's mail fraud conviction, was entered on January 21, 1988. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of the Supreme Court.

F. CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. CONSTITUTIONAL PROVISIONS

(a) No person shall be ... deprived of life,liberty, or property, without due process of law... (United States Constitution, Amendment Five).

(b) In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ..., and to be informed of the nature and cause of the accusation; ... and to have the Assistance of Counsel for his defense.(United States Constitution, Amendment Six).

(c) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.(United States Constitution, Amendment Eight).

2. STATUTORY PROVISIONS:

(a) Whoever, having devised ... any scheme or artifice to defraud ....., for the purpose of executing such scheme or artifice or attempting to do so, places in any post office

or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ..., or knowingly causes to be delivered by mail ... any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both. (Mail Fraud, 18 U.S.C. § 1341).

(b) No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon. (Odometer Tampering, 15 U.S.C. § 1984).

(c) Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter ... shall be fined not more than $50,000 or imprisoned not more than one year, or both. (15 U.S.C. § 1990c, as added Pub. L. 94-364, Title IV, § 408(2), July 14, 1976, 90 Stat. 985)

3. REGULATIONS:

(a) CONVICTION OF LESS OFFENSE. The defendant may be found guilty of an offense necessarily included in the offense charged .... (Rule 31(c),F.R. Crim. P.)

(b) MOTION FOR JUDGMENT OF ACQUITTAL.
(a) Motion before Submission to Jury. ... The court on motion of a defendant ... shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.
(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty ..., a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged.... If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal.... (Rule 29(a) & (c), F.R. Crim. P.)

(c) INSTRUCTIONS. At the close of the evidence ... any party may file written requests that the court instruct the jury on the law as set forth in the requests.... (Rule 30, F.R. Crim. P.).

G. STATEMENT OF THE CASE.

The facts of this appeal are not in dispute. Petitioner was engaged in a fraudulent scheme involving the sale of used cars with their odometers rolled back. He was indicted on August 23, 1983 in the United States District Court for the Western District

of Wisconsin on twelve counts of violating 18 U.S.C. § 1341, prohibiting mail fraud. Jurisdiction in the District Court was based on 18 U.S.C. § 3231.

The mail fraud charges hinged on the fact that after Petitioner sold the cars, the new owners mailed the title documents into the Wisconsin Department of Motor Vehicles in order to record the change in ownership. Petitioner raised the question of whether these mailings were so tangential to his scheme that they could not support a mail fraud conviction, by filing a motion to dismiss the indictment, citing United States v. Maze,414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974).

The District Court denied the motion to dismiss on November 11, 1983, by written order which appears in the Appendix to this petition at p. XLVI (hereinafter App.). The Court interpreted Maze,supra, as holding that mailings which enhance the probability of detection are not "furthering" a scheme, and cannot support a mail fraud charge. However, the Court ruled that the jury should decide whether the mailings in question furthered the scheme.

The indictment against petitioner charged him, in Paragraph Four, with actions that constituted a violation of 15 U.S.C. § 1984, prohibiting odometer tampering. (The indictment appears at App. p. XLII) At the final pretrial conference, petitioner requested that an instruction be given to the jury on odometer tampering as a lesser included offense, relying on the existence of an inherent relationship between the lesser offense, odometer tampering, and the greater offense, mail fraud. The doctrine of "inherent relationship" allows conviction of a lesser offense even where the lesser offense includes elements not required for proof of the greater offense, and has been accepted as the better

rule by the District of Columbia Circuit, (United States v. Whitaker, 447 F.2d 314 (1971), the Tenth Circuit, (United States v. Pino, 606 F.2d 908 (1979), and the Ninth Circuit, (United States v. Johnson, 637 F.2d 1224 (1980). Sometimes the inherent relationship rule benefits the prosecution, vid. United States v. Cova, 755 F.2d 595 (7th Cir. 1985),United States v. Stolarz, 550 F.2d 488 (9th Cir. 1977), cert. den., 434 U.S. 851, 98 S.Ct. 162, 54 L.Ed.2d 119 (1977), United States v. Cooper,812 F.2d 1283 (10th Cir. 1987), United States v. Martin, 783 F.2d 1449 (9th Cir. 1986). The District Court denied the request for the lesser included offense instruction, but did grant petitioner's request to let the jury decide whether the mailings in question actually furthered his scheme. (The final pretrial conference order, of December 16, 1983, appears at App. p. XLVIII).

During the presentation of the Government's case, petitioner's counsel brought out the fact that the documents which were mailed in almost every case actually contained the falsified odometer reading, so that a simple comparison of the mailed documents with the odometer statements from the prior car owners demonstrated petitioner's fraud. At the close of the Government's case, petitioner moved for judgment of acquittal under F.R. Crim. P. 29(a). Petitioner relied on United States v. Maze,supra, and a Seventh Circuit case, United States v. Galloway, 664 F.2d 161 (1981). Galloway was another mail fraud prosecution grounded in an odometer tampering scheme, differing only in the circumstance that the mailings in Galloway did not contain odometer readings. The same District Court Judge in the present case, the Honorable Barbara B. Crabb, had presided over the trial in Galloway, and had granted a directed verdict of not guilty in that case, relying on Maze. The Court of Appeals

reinstated the conviction in Galloway, but suggested in a footnote that had the mailings contained odometer readings, detection of Galloway's scheme might have been rendered more likely by the mailings, which would bring them within the scope of Maze.

The motion for judgment of acquittal was denied, and petitioner presented his evidence, tending to show how the mailings in question helped to uncover his scheme. Prior to counsels' arguments, the government requested a motion in limine prohibiting petitioner's counsel from arguing to the jury that petitioner had committed odometer tampering, but not mail fraud on the grounds that such an argument was a back door way of introducing the lesser included offense. The Court granted the motion. During rebuttal the prosecutor suggested to the jury that the defendant would escape punishment for his odometer tampering if he was acquitted of the instant charges.

A verdict of guilty on all twelve counts in the indictment was returned on December 20, 1983, and petitioner renewed his motion for a judgment of acquittal, or in the alternative for a new trial. Petitioner argued that the Court, by denying the lesser included offense instruction, yet permitting the government to introduce a great deal of evidence relevant to odometer tampering, had allowed the government to bolster a weak mail fraud case by appealing to the jury's hostility to odometer tampering. The motion for judgment of acquittal or for a new trial was denied by the Court on December 29, 1983.(The order appears at App. p. L). Petitioner was sentenced on February 24, 1984, to 90 days in jail and fined $550.00, and placed on probation for four years. (The judgment of conviction and sentence appear at App. p. LII.) Petitioner filed a notice of

appeal the same day, and execution of sentence was stayed pending appeal to the Court of Appeals for the Seventh Circuit, where jurisdiction was based on 28 U.S.C. § 1291.

Petitioner's appeal raised seven related issues, but the basic points were that the mailings in question were too counterproductive or tangential to his scheme to fairly support a charge of mail fraud, United States v. Maze,supra, and that the government used the fact that petitioner had engaged in odometer tampering to lower its burden of proof, leading the jury to convict him of mail fraud in a doubtful case rather than let an acknowledged odometer tamperer go free, Keeble v. United States,412 U.S. 205, 93 S.Ct.1993, 36 L.Ed.2d 844 (1973). The lesser included offense instruction would have been an appropriate way of preventing this appeal to jury prejudice.

Petitioner's appeal was argued orally on September 13, 1984. On November 12, 1985, the three judge panel reversed petitioner's conviction and ordered a new trial, ruling by a split decision that petitioner should have been afforded the lesser included offense instruction. (The panel decision appears at App. p. XXVIII). The decision is reported at United States v. Schmuck, 776 F.2d 1368 (7th Cir. 1985). The panel accepted petitioner's argument that the law of the Seventh Circuit applied the "inherent relationship" test for lesser included offense instructions, and found that a genuine issue of fact existed as to whether the mailings in question furthered the fraudulent scheme or were counterproductive or merely tangential to the scheme. The panel relied on United States v. Cova, 755 F.2d 595 (7th Cir. 1985), which used the "inherent relationship" rule to uphold a conviction for a lesser offense that did not fit within the greater offense under the traditional "elements" test. Judge

Flaum, who sat on the panel in Cova, also sat on the panel in petitioner's case, and voted to apply the "inherent relationship" rule in both cases, although in Cova it was the government that benefitted by the application of the rule, and in the present case it was the petitioner who benefitted.

After the panel decision, the government requested a rehearing en banc. The request was granted (United States v. Schmuck, 784 F.2d 846 (7th Cir. 1986), and oral argument before the en banc panel was heard on June 9, 1986. (The order for rehearing appears at App. p. XXV). The argument focused on whether the "inherent relationship" test or the "elements" test should be used in determining a lesser or necessarily included offense under F.R. Crim. P. 31(c). On January 21, 1988, the en banc Circuit reversed the panel decision and affirmed the conviction, expressly rejecting the "inherent relationship" test, and overruling Cova,supra. Judge Flaum, joined by Judge Cudahy, dissented, arguing for application of the "inherent relationship" rule as the established law of the circuit, and the better rule. Chief Judge Bauer, the author of the decision in Cova applying the "inherent relationship" test, and Judge Coffey, the third panel member in Cova, joined in rejecting the "inherent relationship" test in the present case, without explaining why their opinion on this question had changed. (The en banc opinion appears at App. p. III).

Petitioner seeks review of the decision of the Court of Appeals on the question of the sufficiency of these facts to support a mail fraud conviction under United States v. Maze,supra, and the question of the appropriate test under F.R.Crim.P. 31(c) for the giving of a lesser included offense instruction, where there is a possibility of jury hostility to

the lesser offense causing conviction of the greater offense in a weak case, Keeble v. United States,412 U.S. 205, 93 S.Ct.1993, 36 L.Ed.2d 844 (1973).

H. REASONS FOR GRANTING THE WRIT.

1. REVIEW WILL RESOLVE THE CONFLICT WITHIN THE CIRCUIT COURTS OF APPEAL OVER THE "INHERENT RELATIONSHIP" TEST VS. THE "ELEMENTS" TEST FOR LESSER INCLUDED OFFENSES.

a) A conflict exists within the Circuits.

The opinions in the present case describe the current split in authority between use of the "inherent relationship" test and the "elements" test in applying F.R.Crim.P. 31(c).

The "inherent relationship" rule, established in the D.C. Circuit by United States v. Whitaker, 447 F.2d 314 (1971), is also followed in the 10th Circuit, vid. United States v. Pino, 606 F.2d 908 (1979), United States v. Cooper, 812 F.2d 1283 (1987), United States v. Burns, 624 F.2d 95 (1979), and the 9th Circuit, vid. United States v. Johnson, 637 F.2d 1224 (1980), United States v. Martin, 783 F.2d 1449 (1986), United States v. Stolarz, 550 F.2d 488(1977). 1982).

The "elements" test is adhered to in the 8th Circuit, vid. United States v. Campbell, 652 F.2d 760 (1981), United States v. Iron Shell, 633 F.2d 77 (1980), and the 3rd Circuit, vid. Government of the Virgin Islands v. Parrillo, 550 F.2d 879 (1977).

The Seventh Circuit, in rejecting the "inherent relationship" test, overruled a line of cases applying the test, including United States v. Cova, 755 F.2d 595 (7th Cir. 1985) and United States v. Stavros, 597 F.2d 108 (7th Cir. 1979).

As Judge Flaum points out in his dissent in the present

case, various "umbrella-like" statutes, such as the mail fraud statute in the present case, are predicated on other, broadly defined, types of criminal conduct. In such cases, the "inherent relationship" test will allow a lesser offense instruction, where the "elements" test typically will not allow the instruction. This state of affairs is unsatisfactory, since it means that a criminal defendant's right to the instruction depends on the fortuitous circumstance of the venue of his case. The only way to resolve the conflict is for this High Court to indicate which rule should prevail.

b) The "inherent relationship" test is a better rule, because it meets the due process concerns of Keeble v. United States,412 U.S. 205 (1973) better than the "elements" test does, as is seen in the present case.

The custom of charging the jury that it might convict a defendant of a lesser offense, if unable to convict him of the offense with which he was charged, originated in the common law of England as an aid to the prosecution, Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973), Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), 2 C.Wright, Federal Practice and Procedure-Criminal § 515 (1969). It arose in situations where the prosecution, apprehensive of the possibility of acquittal, applied the maxim "a half a loaf is better than none". If the prosecution proved some of the elements of the offense charged, but not all elements, and if the elements that had been proved themselves constituted a crime, the jury was permitted to convict the defendant of the proven crime, rather than let a proven criminal go free.

Since the rule, in theory, operated against the defendant, the right of the prosecution to seek instructions on a given

offense came to be limited by the concept of fair notice to the defendant of the possibility of the conviction of a lesser offense. Defendants therefor have argued that it is improper to convict them of a lesser crime if proof of that crime requires some element not required for proof of the crime charged in the indictment, vid. United States v. Cova, 755 F.2d 595 (7th Cir. 1985),United States v. Stolarz, 550 F.2d 488 (9th Cir. 1977), cert. den., 434 U.S. 851, 98 S.Ct. 162, 54 L.Ed.2d 119 (1977), United States v. Cooper, 812 F.2d 1283 (10th Cir. 1987), United States v. Martin, 783 F.2d 1449 (9th Cir. 1986).

In the Federal Circuits that follow the "inherent relationship" rule, these convictions were upheld, although under the "elements" rule they were improper. The Courts looked to the indictment to decide what the defendants were fairly on notice of. It is the indictment that provides notice to the defendant of what acts he is accused of,as well as what statutes his acts allegedly violate, and where the facts alleged in the indictment constitute all the elements of the lesser offense, adequate notice has been given to the defendant.

Although the lesser included offense arose as an aid to the prosecution, defendants came to rely on it in cases where the jury might be influenced to convict them of a more serious crime due to the prosecution's introduction of evidence proving a lesser crime. In Keeble v. United States, supra, this Court established "beyond dispute" that the defendant had a right to a lesser included offense instruction where the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater. The reasoning of Keeble was that, although the jury in theory should acquit the defendant where the prosecution has not proven all of the elements of the crime

beyond a reasonable doubt, in practice there is a substantial risk that:

> Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction, Keeble,supra, at 412 U.S. 204-205).

The danger to the defendant arises from the jury hearing proof of the uncharged crime, and being swayed against the defendant as a result. In measuring the actual risk of an unfair conviction, then, one must look at what the jury heard, and not simply at the abstract elements of the relevant offenses. The same reasoning was applied by this Court in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980):

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction, id. at 447 U.S. 637.

In the present case, the jury was provided with a superfluity of information regarding petitioner's odometer tampering activities, over the objection of petitioner. During voir dire, close to half of the panel of prospective jurors said that they had read or heard about odometer tampering in the media, 5 had had trouble buying used cars, and 2 were excused because they felt that they could not be impartial in a case involving odometer tampering. Over petitioner's objection, the jury was informed that he had sold many other cars with rolled back odometers, in addition to the ones charged in the indictment, and the ultimate purchasers of the cars listed in the indictment testified as to the mechanical troubles that they had

had with their cars.

Despite this continual linking of petitioner to odometer tampering, the jury was given a choice only of convicting him of mail fraud, or setting him free. The jury may well have been unaware that odometer tampering constituted a federal offense with which petitioner could have been charged, since the District Court denied proposed instructions that would have told the jury of the existence of the offense, and prohibited petitioner's attorney from mentioning it during jury argument. Yet the District Court and the Court of Appeals agreed that petitioner's defense to mail fraud depended on the jury considering whether the mailings in question furthered his odometer tampering scheme, or were counterproductive, or merely tangential, to it. As Judge Flaum points out in his dissent to the en banc opinion:

> In his motion for a directed verdict, the defendant argued that the odometer readings in the title forms mailed in his case(the existence and inclusion of which were not disputed) made them counterproductive to his scheme as a matter of law. The district court correctly denied the motion, holding that whether the mailings (with readings included) were so counterproductive to the scheme that they could not fairly be said to have been in its furtherance was a question for the jury. It is that holding, however, that required the court to grant the defendant's request for an odometer tampering instruction. The defendant himself conceded that he had tampered with the odometers. It was therefore a rational possibility that the jury could have convicted the defendant of odometer tampering while acquitting him of mail fraud because it found the mailing of the title forms inimical to the fraudulent car sale scheme. Because this rational possibility existed in the record assembled at trial, the defendant was entitled to a lesser instruction on odometer tampering,United States v. Schmuck,_____F.2d_____(7th Cir. 1988), slip opinion p. 21.

The majority opinion in the present case simply fails to address the due process concerns expressed in Keeble and Beck, supra. There is no discussion of whether the abundant proof of odometer tampering might have influenced the jury to convict in a

doubtful case, cf. Nichols v. Gagnon, 710 F.2d. 1267 (7th Cir. 1983). Even the prosecutor's argument to the jury, suggesting that the petitioner should be convicted, because if acquitted, he would have evaded punishment for his odometer tampering activities, is accepted without remark.

The reasons advanced by the majority for applying the "elements" test, rather than the "inherent relationship" test, are not persuasive. The majority expresses concern about the petitioner's right to notice of the possible lesser offense requiring an abandonment of mutuality, but as the cases cited above demonstrate, the "inherent relationship" rule actually expands the government's ability to charge lesser offenses over the objections of defendants, vid. United States v. Cova, etc., supra.

The majority also considers the application of the "elements" test simpler, and therefor more certain and predictable. However, simplicity of use does not justify a rule that works substantial injustice. In addition, the "elements" test itself can lead to contradictory results in similar cases, as can be seen in the annotation on lesser included offenses at 11 A.L.R. Fed. 173, What Constitutes Lesser Offenses "Necessarily Included" in Offense Charged, Under Rule 31(c), F.R.Crim.P. In cases involving "dragnet" statutes, like mail fraud, RICO, and Continuing Criminal Enterprise, the "elements" test will operate like the bed of Procrustes, ensuring the rejection of lesser offense instructions, no matter how doubtful the proof of the greater charge, or how prejudicial the proof of the lesser, uncharged crime. As Judge Flaum points out in his dissent, there is no compelling reason to adopt an "antiseptic and unworldly formula" which will come to hinder

defense and prosecution alike.

2. REVIEW IS NEEDED UNDER THIS COURT'S SUPERVISORY POWER TO ESTABLISH RESPECT FOR THE PRINCIPLE OF STARE DECISIS.

The principle of stare decisis expresses a social need that points of law, once settled, should not be changed, absent convincing reasons for overruling them. The principle is central to the orderly development of the law, see 3 Moore's Manual Federal Practice and Procedure § 30.04 (1987). As stated in Moore's, "routine reconsideration of the correctness or propriety of binding precedents would be enormously destructive", id. at 3 Moore's p. 30-11. The legitimate expectations of parties that the same law shall prevail for litigants with similar claims, or the right to equal treatment before the law, is implicated in the doctrine.

In the instant case, the Court of Appeals reversed the settled law of the Seventh Circuit regarding lesser included offenses. As far back as United States v. Stavros, 597 F.2d 108 (7th Cir. 1979), the Seventh Circuit has looked beyond the "elements" of the offense in deciding whether an offense constituted a lesser included offense. Judge Fairchild, author of the majority opinion below, joined in the ruling in Stavros. In United States v. Cova, 755 F.2d 595 (7th Cir. 1985), decided in the same year as the panel decision in the present case, Chief Judge Bauer, joined by Judge Coffey and Judge Flaum, applied the "inherent relationship" test for the benefit of the government.

In Cova, Judge Bauer wrote:

> In determining whether an offense is included in a greater offense, a court should not be limited to consideration of only the language of the statute under

> which the defendant was charged because a statute may be violated in different ways. Stavros, 597 F.2d at 112. Accordingly, this circuit has also considered the facts alleged in the indictment, Stavros, 597 F.2d at 112, and the evidence presented at trial, United States v. Johnson, 506 F.2d 305 (7th Cir. 1974 (per curiam), cert. den., 420 U.S. 1005, 95 S.Ct. 1448, 43 L.ed.2d 763 (1975), in determining whether a lesser included offense instruction was proper, id. at 755 F.2d 596.

Surely it was incumbent upon these judges to explain why their opinion as to the proper law of the circuit had changed so dramatically, in so short a period of time. By applying a different rule in the present case than was applied in Cova, the government won both cases, even though both cases were commenced, and tried, at the same time.

3. THE COURT OF APPEALS SHOULD HAVE APPLIED THE RULING OF THIS COURT IN UNITED STATES V. MAZE, 414 U.S. 395 (1973), TO THE FACTS OF THIS CASE.

From the commencement of this case, petitioner has consistently asserted that his actions, as a matter of law, could not constitute mail fraud, because the mailing of title documents by the victims of his odometer tampering scheme were counterproductive to his scheme, or at most routine mailings, intrinsically innocent, relying on United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), and United States v. Tarnopol, 561 F.2d 466 (3rd Cir. 1977). However, this argument was rejected on the authority of United States v. Galloway, 664 F.2d 161 (7th Cir. 1981).

Petitioner feels, like the dissent in Galloway, that the circumstances of this case are sufficiently close to Maze as to be indistinguishable. Thomas Maze went on an interstate spree

with stolen credit cards, and was convicted of mail fraud based on the mailing of sales slips by the merchants that he defrauded. This Court considered the question of whether these mailings were sufficiently closely related to his scheme to bring his conduct within the mail fraud statute, and decided that they were not. As Justice Rehnquist observed:

> Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all, Maze at 414 U.S. 402.

When a car is sold with a tampered odometer, the illicit gain is realized before the title transfer is ever recorded. As the testimony in the present case established, laws requiring the registration of title transfers, including reporting odometer readings, fulfill an important purpose in helping detect and record the perpetration of frauds. Like Maze, the petitioner would have been better off if the title documents had never been mailed in at all. If the routine mailing of title documents raises odometer tampering to the level of mail fraud, then odometer tampering will always be prosecutable as mail fraud.

This Court has had occasion in recent years to consider the proper scope and application of the mail fraud statute, and it is plain that a practical, common sense approach to this question is preferred. Compare McNally v. United States, 483 U.S. ____, 97 L.Ed.2d 292, 107 S.Ct. ___ (1987) (Congress' intent in passing the mail fraud statute was to prevent the use of the mails in furtherance of fraudulent schemes) with Carpenter v. United States, 484 U.S. ____, 98 L.Ed.2d 275, 108 S.Ct. ___(1987) (Circulation of newspaper column through mails and wire service

was essential to produce profit from scheme), and United States v. Lane, 474 U.S. 438, 88 L.Ed.2d 814, 106 S.Ct. 725 (1986) (mailings had "lulling" effect).

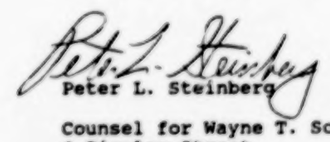
Applying these principles to the present case, the mailing of the title documents to the Wisconsin Department of Motor Vehicles did nothing to assist petitioner, and had a great deal to with his getting caught.

4. CONCLUSION

Petitioner seeks a writ of certiorari to review his convictions because, although he was admittedly guilty of odometer tampering, he was not guilty of mail fraud, and was only convicted of mail fraud because the jury was forced to choose between conviction for mail fraud, or complete acquittal. Had the jury been properly instructed, he would only have been found guilty of odometer tampering. For the foregoing reasons, the writ should issue, and petitioner's convictions should be reversed outright, or a new trial granted.

Dated: February 11, 1988.

Respectfully submitted,



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I. APPENDIX.

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JUDGMENT ORDER ON REHEARING

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 21, 1988 ✓

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge*
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 84-1317 vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 83 CR 56
BARBARA B. CRABB, Judge.

This cause was reheard on the record from the United States District Court for the Western District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

* Senior Circuit Judge Swygert heard oral argument and voted at the post-argument conference to reverse, adhering to the reasons stated in his opinion herein for the panel. 776 F.2d 1366. Because of illness, however, he has not participated further.

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1317

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WAYNE T. SCHMUCK,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 83 CR 56—**Barbara B. Crabb**, *Judge.*

REHEARD *EN BANC* JUNE 9, 1986—DECIDED JANUARY 21, 1988

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, and RIPPLE, *Circuit Judges*, and SWYGERT* and FAIRCHILD, *Senior Circuit Judges.*

FAIRCHILD, *Senior Circuit Judge.* In *United States v. Schmuck*, 776 F.2d 1369 (7th Cir. 1985), a divided panel decided that under the facts of this mail fraud prosecution, the offense of knowing and willful odometer alteration was a lesser included offense within the charged offense of

* Senior Circuit Judge Swygert heard oral argument and voted at the post-argument conference to reverse, adhering to the reasons stated in his opinion herein for the panel. 776 F.2d 1369. Because of illness, however, he has not participated further.

mail fraud. Defendant's conviction was reversed, therefore, because it was error to refuse an instruction under Rule 31(c), F. R. CRIM. P., on the possibility of finding defendant guilty of the odometer offense. Although odometer alteration is not a statutory element of mail fraud, the panel, relying on *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), held that there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. 776 F.2d at 1371. Accordingly the odometer offense proved by the evidence constituted a lesser included offense for the purpose of Rule 31(c).

The panel decision was vacated and rehearing *en banc* granted. *United States v. Schmuck*, 784 F.2d 846 (7th Cir. 1986). We now reject the *Whitaker* doctrine and decide that the odometer offense, though proved, was not a lesser included offense, or, as Rule 31(c) says "an offense necessarily included in the offense charged." All other significant claims raised were correctly decided adversely to defendant in Part I of Judge Swygert's opinion, 776 F.2d at 1369-70. We now adopt Part I and affirm.

I

Defendant Schmuck was convicted, after a jury trial, of 12 counts of mail fraud. Each count of the indictment alleged a scheme by Schmuck to defraud purchasers of used automobiles by representing that the automobiles had substantially less mileage than was true. Schmuck would purchase automobiles, cause their odometer readings to be altered, offer them to dealers, and provide purchasing dealers with an odometer statement reflecting the false mileage. The dealers would sell the cars to retail customers. Both the dealers and the customers would rely on the false readings and pay more than if readings had not been reduced. In order to obtain titles in the names of their customers, the dealers would mail Wisconsin title applications to the Wisconsin Department of Transportation. Each count of the indictment alleged the mailing of an application for title for an automobile by a dealer on

a specified date. Five different dealers were named; three dealers made only one mailing, one made four, and one five. It was charged that Schmuck caused each mailing for the purpose of executing the scheme.

Pursuant to Rule 31(c), defendant moved prior to trial for an instruction that would have permitted the jury to convict him of odometer alteration as a lesser included offense of mail fraud, presumably on each count. That motion was denied. He was convicted and appealed.

In reversing and remanding for a new trial, the panel rejected the "traditional" definition of a lesser included offense, in favor of the "inherent relationship" approach first expounded in *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971). The traditional (elements) test requires identity of the elements of the two offenses, such that some of the elements of the crime charged themselves comprise a separate, lesser offense; to be necessarily included, the elements of the lesser offense must be a subset of the elements of the charged offense. *See Sansone v. United States*, 380 U.S. 343, 349-50 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *United States v. Campbell*, 652 F.2d 760, 762 (8th Cir. 1981); *Government of the Virgin Islands v. Parrilla*, 550 F.2d 879, 881 (3rd Cir. 1977). Thus where the lesser offense requires an element not required for the greater offense, an instruction should be refused.[1]

[1] Several courts have listed five conditions to be met where a Rule 31(c) instruction is requested. The second is "the elements of the lesser offense must be identical to part of the elements of the greater offense" and the fifth "in general the chargeability of lesser included offenses rests on a principle of mutuality, that if proper, a charge may be demanded by either the prosecution or defense." *Whitaker*, 447 F.2d at 317; *United States v. Campbell*, 652 F.2d 760, 761 (8th Cir. 1981); *United States v. Chapman*, 615 F.2d 1294, 1299 (10th Cir.), *cert. denied*, 446 U.S. 967 (1980); *but see* n.5 *infra*, as to Tenth Circuit position. Another formulation is that the lesser offense must be such that it is impossible

(Footnote continued on following page)

Broadly speaking, there are two elements of an offense under the mail fraud statute: (1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts); and (2) use of mail for the purpose of executing the scheme or attempting to do so.[2] It is not required that any part of the contemplated scheme be performed, although in practice fraudulent conduct usually is proved in order to establish the scheme. The odometer offense consists of knowingly and willfully altering or causing alteration of an odometer with intent to change the number of miles indicated.[3] Each statute requires proof

[1] *continued*

to commit the greater offense without having committed the lesser. *Government of Virgin Islands v. Aquino*, 378 F.2d 540, 554 (3rd Cir. 1967). "The lesser included offense doctrine does not apply where the lesser offense includes an element, such as possession, not required for the greater offense." *Campbell*, 652 F.2d at 761.

[2] 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] 15 U.S.C. § 1984 provides:

> No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon.

§ 1990c(a) prescribes a misdemeanor penalty for knowing and willful violation of any provision of the subchapter, including § 1984.

of facts not required by the other. The two offenses are separate. *Blockburger v. United States*, 284 U.S. 184, 187-88 (1957).

In determining, for this purpose, the elements of the offense charged, the ordinary focus is upon the statute defining the offense. Where the statute prescribes an element in general language, capable of wide variation in types of conduct, e.g., mail fraud, falsification (18 U.S.C. § 1001), continuing criminal enterprise (21 U.S.C. § 848), RICO (18 U.S.C. § 1963), failure to perform any of several types of statutory duty (e.g., 26 U.S.C. § 7203) there is logical appeal for the proposition that the terms of the indictment will narrow the scope of the elements to be examined. *See United States v. Stavros*, 597 F.2d 108, 110 (7th Cir. 1979); *but see United States v. Kimberlin*, 781 F.2d 1247, 1257 n.10 (7th Cir. 1985). Given the present indictment, however, alleging as one element devising a scheme to defraud purchasers of automobiles with altered odometers, knowingly and willfully causing an odometer to be altered is not identical to the element of having devised the scheme.

The District of Columbia Circuit rejected strict comparison of elements in favor of inquiry whether there was an "inherent relationship" between the crime charged and a lesser offense proved at trial. The defendant in *Whitaker* had been charged with first degree burglary, and his request for an instruction permitting conviction of the lesser offense of unlawful entry was denied, because the District of Columbia Code did not exclusively require unlawful entry as an element of first degree burglary, and therefore unlawful entry would not be a lesser included offense under the traditional test. However, because the proof showed that defendant had, in fact, committed the burglary by means of an unlawful entry, in reversing and remanding for a new trial, the court held that

> [a] more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense

> is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.

447 F.2d at 319.

The *Whitaker* court went on to note that the Constitution and the common law require that the charge in the indictment give the defendant notice that he could also be convicted of any lesser included offenses, if the evidence so warrants. The prosecution as well as the defendant may seek an instruction pursuant to Rule 31(c) under the traditional test, because all elements of the lesser included offense have, by definition, been charged. *Whitaker* dispensed with the mutuality requirement, because of "considerations of justice and good judicial administration. . . . [T]he defense ought not to be restricted by the stringent constitutional limits upon the prosecutor's right . . . [and] doubt as to whether the prosecution could rightfully have requested such a charge should not bar the charge being given at the request of the defense." *Id.* at 321.

Applying the *Whitaker* approach, the panel in the present case concluded that

> there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. . . . [I]t can generally be expected that proof of mail fraud will entail proof of a completed underlying "fraud," although this is certainly not always true. . . . An instruction on odometer tampering simply informs the jury that the defendant's conduct is less serious if it does not entail a sufficient abuse of the mails to come within the mail fraud statute and encourages the jury to make an informed judgment as to the degree of culpability.

776 F.2d at 1371.

Having found the requisite relationship between odometer alteration and mail fraud, the panel turned to the second requirement of the right to a lesser included offense instruction: whether the proof of the element necessary for the greater crime but not for the lesser crime is sufficiently in dispute so that a rational jury could find the defendant not guilty of the greater but guilty of the lesser. *Keeble v. United States*, 412 U.S. 205, 208 (1973); *Sansone v. United States*, 380 U.S. 343, 350 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). Whatever the test used to determine whether one offense is included within another, there is agreement that there must be a separable issue in the case as to the distinguishing element. *Cf., e.g., United States v. Pino*, 606 F.2d 908, 917 (10th Cir. 1979) (inherent relationship approach) with *United States v. Campbell*, 652 F.2d 760, 763 (8th Cir. 1981) (traditional test). The panel held that the jury could have rationally found that the mailings were counterproductive to the fraud because they brought the fraudulent readings to the authorities' attention, or that the mailings were too tangential to the success of the scheme to be deemed "in furtherance" of the scheme.

II

A. Rule 31(c)

We reject the inherent relationship test,[4] and hold that an offense is necessarily included within another for the purpose of Rule 31(c) only when the elements of the lesser offense form a subset of the elements of the charged of-

[4] The author of this opinion also adheres to his previously expressed view that there is no inherent relationship between odometer alteration and mail fraud even if the *Whitaker* doctrine were to prevail. 776 F.2d at 1373-75, Fairchild, *J.*, concurring in part, dissenting in part.

fense.[5] The elements approach is grounded in the terms and history of Rule 31(c), comports with the constitutional requirement of notice to defendant of the potential for

[5] The Second Circuit states the test in terms of elements. *See United States v. Lo Russo*, 695 F.2d 45, 52 n.3 (2d Cir. 1982), *cert. denied sub nom. Errante v. United States*, 460 U.S. 1070 (1983). We have found no case, however, where the Second Circuit has rejected the *Whitaker* approach. The Third Circuit states the elements test and asserts specifically "[t]he elements of the offense are compared *in the abstract*, without looking to the facts of the particular case." *Government of Virgin Islands v. Joseph*, 765 F.2d 394, 396 (3rd Cir. 1985). The Eighth Circuit has adhered to the elements test, noting, but taking no position on, the question of abandoning mutuality. *United States v. Campbell*, 652 F.2d 760, 762-63 (8th Cir. 1981).

Decisions of the Fourth Circuit, *see United States v. Carter*, 540 F.2d 753, 754 (4th Cir. 1976), and the Fifth Circuit, *see United States v. Williams*, 775 F.2d 1295, 1302 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1477 (1986), are consistent with the elements approach.

Circuits adopting the inherent relationship test are the District of Columbia, *Whitaker*, 447 F.2d 314 (D.C. Cir. 1971); and the Ninth, *United States v. Martin*, 783 F.2d 1449, 1451-53 (9th Cir. 1986).

The Tenth Circuit adopted the *Whitaker* doctrine in a 1979 decision, *United States v. Pino*, 606 F.2d 908, 914-17 (10th Cir. 1979). In a 1980 decision, the court stated the traditional test, including the requirement of mutuality. *United States v. Chapman*, 615 F.2d 1294, 1298-99 (10th Cir.), *cert. denied*, 446 U.S. 967 (1980). In 1982, the court applied the *Whitaker* doctrine, *citing Pino*, but not *Chapman*. *United States v. Zang*, 703 F.2d 1186, 1196 (10th Cir.), *cert. denied sub nom. Porter v. United States*, 464 U.S. 828 (1983). *Zang* happened to be a prosecution for mail fraud. The scheme to defraud involved overcharging for crude oil by miscertification of the "tier" of the oil. Such miscertification was a violation of EPA regulations, and the court found this violation was not a lesser included offense because there was no inherent relationship between it and mail fraud. In 1987, the Tenth Circuit relied on *Pino* and *Whitaker* in affirming the conviction of a lesser offense, one element of which was not included in the offense charged. *USA v. Cooper*, 812 F.2d 1283 (10th Cir. 1987). The dissenting judge would approve the *Whitaker* doctrine where a defendant requested the instruction, but concluded that in the case before the court, defendant had been convicted of an offense not charged.

conviction of an offense not separately charged, permits a greater degree of certainty in the application of Rule 31(c), and harmonizes the concept of "necessarily included" under Rule 31(c) with that of a lesser included offense where the issue is double jeopardy.

Although the Supreme Court has not spoken directly to this issue,[6] we believe that decisions involving Rule 31(c) motions suggest the Court's adherence to the traditional method. In *Keeble v. United States*, 412 U.S. 205 (1973), the Court held the defendant entitled to an instruction on a lesser included offense. The Court compared the statutory elements of the offense charged—assault with intent to commit serious bodily injury—with those of the offense on which an instruction was sought—simple assault—stating

> an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented.

Id. at 213. The Court did note the *Whitaker* decision and that it had dispensed with mutuality as a necessary prerequisite to the defendant's right to a lesser included offense instruction. The Court found it unnecessary to decide that question. *Id.* at 214 n.14.

Similarly, in *Sansone v. United States*, 380 U.S. 343 (1965), the elements of violation of § 7201 of the Internal Revenue Code of 1954, willful tax evasion, were compared with those of § 7207, willful filing of a fraudulent or false return, and § 7203, willful failure to pay taxes when required, to determine whether the latter misdemeanors were offenses included within the felony charged under

[6] The Court has articulated a statutory elements test for a lesser included offense for double jeopardy purposes. *See, infra*, pp. 12-13.

§ 7201. The Court determined that petitioner was not entitled to a lesser included offense instruction because on the facts of the case, the three statutes covered the same ground. The Court said that "§ 7201 necessarily includes among its elements actions which, if isolated from the others, constitute lesser offenses" and instruction should be given if a jury could rationally find that "although all the elements of § 7201 have not been proved, all the elements of one or more lesser offenses have been" proved. *Id.* at 351; *see also Berra v. United States*, 351 U.S. 131, 134 (1956) ("where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction").

These cases counsel in favor of the elements test because the Court examined and compared statutory elements in deciding whether the lesser offense was necessarily included in the offense charged. The decisions nowhere suggest any different inquiry into the relationship between offenses, nor any relaxation of the traditional test where a lesser offense proved could be deemed inherently related to the charged offense.

The statutory elements test is also faithful to the text of Rule 31(c), where the critical phrase is "necessarily included in the offense charged." The inherent relationship approach in effect reads out "necessarily included in" and substitutes something like "factually related to and serves the same policy goals as" the charged offense. Neither the court in *Whitaker* nor any decision adopting its analysis has addressed how the language of the Rule gives rise to the inherent relationship test.

The text of the Rule makes no distinction between a motion made by the defendant or by the government. Yet the inherent relationship approach requires that motions by the government and the defendant be treated differently, because the charge of the greater offense does not give notice that defendant is facing a charge of a lesser offense all the elements of which are not identical to ele-

ments of the charged offense. If the determination whether the crimes are sufficiently related is not made until all the evidence is developed at trial, the defendant may not have had notice constitutionally sufficient to support an instruction at the prosecution's request. Thus, the relationship test dispenses with the requirement of mutuality without explaining how the text of the Rule supports a different result depending upon who makes the motion.

Moreover, the history of the Rule suggests that it codified the traditional approach. "At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." *Beck v. Alabama*, 447 U.S. 625, 633 (1980); *United States v. Cova*, 755 F.2d 595, 597 (7th Cir. 1985); *see* 2M Hale, Pleas of the Crown 301-02 (1736); *Rex v. Withal & Overend*, 168 Eng. Rep. 146 (1772). In 1872, this concept was enacted as a statute,[7] now contained in Rule 31(c). The advisory Committee Notes state that the Rule is a "restatement of existing law." *See Keeble*, 412 U.S. at 208 n.6. Thus, there is no indication that the Rule was intended to abrogate the traditional approach to lesser included offenses, including the availability of an instruction in aid of the Government, nor can the Supreme Court's recognition of the defendant's right to an instruction be read as an endorsement of any nonmutual restrictions on the Government.

A significant consideration is the inherent relationship test's lack of certainty and predictability. *See United States v. Johnson*, 637 F.2d 1224, 1238 (9th Cir. 1980) (statutory approach "may be appealing in its promise of certainty and intellectual purity"). Finding an inherent

[7] "[I]n all criminal cases the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment. . . ." 17 Stat. 197, 198 (1872).

relationship requires a determination that the offenses relate to the same interests and that "in general" proof of the lesser "necessarily" involves proof of the greater. *Whitaker*, 447 F.2d at 319. These new layers of analysis add to the uncertainty of the propriety of an instruction in a particular case: not only are there more issues to be resolved, but correct resolution involves questions of degree and judgment, with the attendant probability that the trial and appellate courts may differ.

Another problem with relaxation of the traditional test is that relaxation may well permit defendants to seek a lenient outcome by requesting a lesser included offense instruction on every lesser offense that could possibly be made out from the evidence. This tendency to misuse the Rule was recognized in *Whitaker*, and is the reason why the *Whitaker* court required that there must be an inherent relationship between the lesser offense and the offense charged. 447 F.2d at 319.

We find, on balance, no persuasive reason to substitute the *Whitaker* doctrine for the traditional approach.[8]

B. Double Jeopardy and Cumulative Punishment.

Rule 31(c) uses the language, "an offense necessarily included in the offense charged." Many of the decisions on a Rule 31(c) problem use the term "lesser included of-

[8] In *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985), defendants were charged with conspiracy to distribute cocaine. The district court found insufficient evidence, but submitted an amended charge of conspiracy to possess, and defendants were convicted. Although there was no discussion of *Whitaker*, this court affirmed, holding that conspiracy to possess (proved) was a lesser included offense of the charged conspiracy to distribute. *Id.* at 599. Because it is possible for persons acquiring lawful possession to conspire to distribute, the elements test seems not to have been fulfilled. To the extent that *Cova* stands for a permitted departure from the elements test, it is overruled. *See also* reference to *Cova* in *United States v. Kimberlin*, 781 F.2d 1247, 1256-57, and n.10.

fense." The "lesser included offense" concept is also significant in determining certain claims of double jeopardy or unlawful cumulative punishment. *See Brown v. Ohio*, 432 U.S. 161 (1977).

It seems desirable that, as nearly as possible, the terminology should have the same meaning in both contexts. Using the elements test for Rule 31(c) problems at least approaches keeping the same meaning.

It is at least arguable that in the double jeopardy and cumulative punishment contexts the requisite identity of elements is to be determined solely from comparison of the two statutes, and that the indictment does not narrow the type of elements to be examined. *Brown*, 432 U.S. at 168; *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Woodward*, 469 U.S. 105, 108; *United States v. Kimberlin*, 781 F.2d 1247, 1255-57 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 419 (1986). The focus is "on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." *Illinois v. Vitale*, 447 U.S. 410, 416 (1980). We need not decide in the case before us whether the allegations of the indictment will properly narrow the scope of the statutory elements to be examined in a given case.

The judgment appealed from is AFFIRMED.

FLAUM, *Circuit Judge*, with whom CUDAHY, *Circuit Judge*, joins, dissenting.

I do not agree with the majority's conclusion that the use of the "inherent relationship" test in determining when to give a lesser included offense instruction contravenes either the language or purpose of Federal Rule of Criminal Procedure 31(c). Accordingly, I would leave *United States v. Cova*, 775 F.2d 595 (7th Cir. 1985), and its predecessors intact as the law of this circuit. Applying that test, I conclude that the district court erred in denying the

defendant's requested lesser included offense instruction on odometer tampering.

I.

It seems to me inherently contradictory to discuss the appropriateness of giving any jury instruction without reference to the evidence adduced at trial, which will always permit the most complete assessment of what instructions the record will support. Nonetheless, the majority concludes that to do so would violate the text of Rule 31(c), which provides in relevant part that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . . ." The rule does not specifically mention instructions. Nevertheless, we know they are necessary to inform the jury of the existence and elements of appropriate offenses. None of the reasons advanced by the majority persuade me that a more constricted analysis of whether an instruction is supportable is necessary or even desirable simply because the proposed instruction presents the jury with an optional lesser charge. If the record fairly and rationally supports a tendered instruction, and if the instruction comports with the law on the subject and does not unfairly prejudice any party, we have no grounds for barring it.

To confine the determination of whether to give an instruction to an analysis of statutes is to impose an artificial restraint on the instruction formulation process. Nowhere is this artificiality more apparent than in *Cova*, the case that the majority herein overrules. In that case this court held that in light of the manner in which the government had proved its case, conspiracy to possess cocaine was a lesser included offense of conspiracy to distribute it. Conspiracy was a lesser included offense because the government offered proof that the defendant's method of supposed distribution included obtaining possession. 775 F.2d at 598. The majority of this *en banc* court concludes that *Cova*'s result could not be sustained under the element comparison test "[b]ecause it is possible for persons acquiring lawful possession to conspire to distribute," an

occurrence that is probably rare but, more significantly, is completely alien to the government's theory in *Cova*. *See supra* n.8. In plain terms, had the "elements" test been applied in *Cova*, the government would have lost a case that it had proved for a reason that had nothing to do with the case itself.

The test applied in *Cova* does not really change the question to be asked under Rule 31(c) in determining whether an instruction on a lesser offense should be given; rather, it simply expands the scope of the inquiry undertaken in answering that question. After all, it is the indictment that delimits the "offense charged" by the government in a particular case. The specific offense is further defined by the proof presented by the government at trial. Permitting consideration of the indictment and succeeding evidence, *in addition to* the elements set forth in the relevant statutes, can only lead to a more complete and accurate determination of the character of the "offense charged" in a given case, and of the lesser offenses necessarily subsumed therein. An assessment of what offenses the government has *proved* beyond those it charged can hardly be conducted without considering what the government's proof was.

The need for a complete method of determining what lesser offenses are included within a charged offense is particularly great where, as here, the statute at issue is one that can be violated in a number of ways. Indeed, the past several years have seen the enactment of a number of criminal statutes that can be violated in various ways, and that in fact are specifically predicated on violations of any number of other legal provisions. *See, e.g.*, 18 U.S.C. § 1963 (RICO); and 21 U.S.C. § 848 (Continuing Criminal Enterprise). The mail fraud statute at issue herein, 18 U.S.C. § 1341, also defines a violation in terms of other offensive conduct. It does not, however, attempt to limit the specific varieties of pertinent conduct in order to afford the government broad authority to battle particular fields of crime. These statutes are umbrella-like and, especially where RICO and the CCE statute are con-

cerned, carry extensive penalties. They are exactly the type of offenses for which consideration of lesser offenses is appropriate under Rule 31(c), but it is hard to imagine how any lesser included offense could ever be considered under the elements test, precisely because these "greater" offenses are so broadly defined. The lesser offense, because of its specific nature, will always contain elements not necessary for conviction under the broader statute. It is this exact concern that recently led a panel of the Tenth Circuit, in three separate opinions, to conclude that both the "elements" test and the "inherent relationship" test are valid, and that the use of each should be dictated by the nature of the individual case. *United States v. Cooper*, 812 F.2d 1283, 1285-86 (10th Cir. 1987); *id.* at 1287 (Baldock, J., concurring); *id.* at 1289 (McKay, J., concurring and dissenting).

The majority also decries the "inherent relationship" test because it necessarily results in the abandonment of the rule of "mutuality," which allows one party to request an instruction on a lesser included offense only if the other party also could have done so. This rule is inconsistent with a test for lesser included offenses that takes into account the evidence introduced at trial because the government is not permitted to alter the charges contained in the indictment when it submits them to the trier of fact if such alteration would prejudice the defendant, i.e. (as is relevant here) if the original indictment did not put the defendant on notice of the possibility of the alternate charge. *See generally Stirone v. United States*, 361 U.S. 212, 215-18 (1960); *United States v. Cina*, 699 F.2d 853, 857-58 (7th Cir. 1983). This latter rule, it should be noted, is the product of concerns for fairness at trial and the recognition of the role of an indictment in informing a defendant of the nature of the charges against him, as opposed to any specific concern for the relationship of the offenses to one another. The *Whitaker* court, in formulating the "inherent relationship" test, recognized that these principles of fairness would be violated if the government were permitted to submit an alternative charge

to the jury that, although supported by the trial record, was not sufficiently foreshadowed by the indictment. Accordingly, that court determined that the principle of mutuality should be "dispens[ed] with" so that the "inherent relationship" test could be applied. 447 F.2d at 320-22.

I agree with the *Whitaker* court's conclusion that the principle of mutuality is not necessary to the fair administration of justice and that it is properly discarded in favor of the "inherent relationship" test. In an ideal world, where all lawyers would be omniscient, *both* sides would be able to request instructions on lesser offenses based on the full trial record, which would have been anticipated before trial by omniscient defense counsel. In the real world, however, fairness requires that the prosecution be allowed to request only instructions that could fairly have been expected prior to trial. Defendants should be allowed to request instructions based on all the information available to them at the time of the request, including the trial record, thereby waiving any claim that *they* were not on notice. It may be, as the *Whitaker* court concluded, that this distinction gives no unfair advantage to defendants over prosecutors because prosecutors, who bear the burden of proof, will be able to assess the likely state of the record in advance and make their charging decisions accordingly. 447 F.2d at 321. Even if there is some advantage gained by defendants due to the abandonment of mutuality, that advantage is outweighed by the interests of justice that favor continued adherence to the "inherent relationship" test. This is hardly the only area of criminal trial law in which different rights accrue to the two respective sides.[1]

[1] The majority also opines that it "seems desirable" that the same test be used for determining whether a lesser offense instruction should be given and for determining whether cumulative punishment and/or separate trial is permissible on two charged offenses. *Supra* p. 13. I do not see why this identity is required. If a more expansive test is used for instruction purposes, the result will be that in some cases both instructions will be allowed where the

(Footnote continued on following page)

II.

I turn now to an evaluation of the instant case under the test originally formulated in *Whitaker* and refined by this court in *Cova* and several preceding cases, as well as in the panel opinion in this case. A comparison of the elements of the two crimes, mail fraud and odometer alteration, reveals (as the majority concludes) that the latter does not fall within the former as they are defined in the statute; proof of odometer alteration is not an element of mail fraud. In fact, no particular crime or unlawful conduct (or, for that matter, particular lawful conduct) is proscribed by the mail fraud statute with the exception of the act of mailing or causing matter to be mailed. This illustrates an earlier point, *i.e.* that statutes like the mail fraud provision, broadly drafted to encompass whole classes of illegal activity, will have few if any lesser included offenses under the elements test. Nevertheless it is clear to me that when the indictment and trial record are taken into account, the offense of odometer tampering should be considered a lesser included offense of mail fraud in this case.

In the instant case, the mailings that were the subject of the charges against the defendant were not separate

[1] *continued*
two offenses could be punished cumulatively or tried separately, i.e. where they are "separate" offenses under the elements test. I do not foresee any undesirable consequences flowing from this eventuality. If a defendant in such a case is acquitted on both charges he cannot be retried on either, not because of their relationship but because the acquittal itself acts as a bar. The same is true if the defendant is only convicted of the lesser offense; he could not be retried on the greater because his lesser conviction represents an implied acquittal on the greater charge. If he is convicted of the greater offense there is a *theoretical* possibility that the government could retry him on the lesser charge (because the jury never considered it), but this is highly unlikely. Of course, in a case such as the one I have just described the prosecution presumably would be free to charge both offenses initially and to seek consecutive sentences thereon.

from the fraudulent *acts* of which he was accused, but followed those acts both logically and chronologically. The mailings of the title applications by the defrauded car dealers, which the government claimed were caused by the defendant, were the direct result of the sales of altered cars. These sales were in turn the result of the odometer alterations that the defendant now asserts are lesser included offenses. As the government proved *this* case, it *had* to prove odometer tampering because tampering led to sale, which led to mailing. Had the charged mailings occurred before the tampering and/or in furtherance of the scheme (*e.g.* a letter from defendant to a confederate instructing him on tampering procedures or to a dealer proposing a fraudulent sale), it would not have been necessary to prove any fraudulent conduct beyond that of devising the scheme.[2] As is frequently the case, though, the government proved fraud in this instance by proving execution. In this case it *had to* prove execution because the charged mailings would not have occurred if the fraud had not been carried out. In this case, therefore, "proof of the lesser offense [was] necessarily presented as part of the showing of the commission of the greater offense." *Whitaker*, 447 F.2d at 319 (footnote omitted).

[2] In view of this analysis, the original panel opinion may have gone further than necessary in declaring generally that "there is an inherent relationship between mail fraud and the 'fraud' that underlies the mail fraud offenses." 776 F.2d at 1371. This may not always be the case, as the illustration in the text suggests. The analysis this court applied in *Coon* reflects, in my view, the correct use of information beyond the mere statutory elements by concentrating on the case as charged and tried, even though this may reflect some difference with the *Whitaker* court's formulation. There is really no need to discuss in the context of jury instructions how a prosecutor would "generally" charge or prove mail fraud when a black-and-white indictment and a real evidentiary record are available.

III.

The conclusion that odometer tampering should be considered as a lesser included offense of mail fraud in this case does not complete the inquiry necessary to determine whether an odometer tampering instruction should have been given. Even if a lesser offense is included in a greater offense (either under the majority's test or under the *Coon* test), a lesser offense instruction should not be given unless the evidence permits the jury "rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). *See also United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). As Judge Swygert pointed out in his original panel opinion, this requirement serves two functions: it prevents a defendant from using a lesser offense instruction simply as a device to allow him to ask for mercy from the jury, and it preserves the district judge's domain over questions of law and the jury's over questions of fact. 776 F.2d at 1371-72. In the present case the defendant presented at trial a rational basis upon which the jury could have found him guilty of odometer tampering but not guilty of mail fraud. The district court therefore erred in denying the defendant's request for the odometer tampering instruction.

At the close of the government's case, the defendant moved for a directed verdict of acquittal, basing his motion in part on *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982), a case that concerned a nearly identical mail fraud scheme. In *Galloway* the defendant argued that his conviction under the mail fraud statute was precluded by the fact that the title documents mailed by the car dealers actually led to his capture, i.e. that they were counterproductive to rather than in furtherance of his fraudulent scheme. This court disagreed, concluding that the mailings were necessary to complete the retail sale of the automobiles and that they could not therefore be considered counterproductive to the scheme. 664 F.2d at 165, *distinguishing United States v. Maze*, 414 U.S. 395 (1974). In *Galloway*, how-

ever, the title applications that were contained in the unlawful mailings did not include odometer readings because none were required. This court noted that "[s]uch a requirement, of course, might have made detection of the scheme more likely." 664 F.2d at 165 n.7.

In his motion for a directed verdict, the defendant argued that the odometer readings in the title forms mailed in his case (the existence and inclusion of which were not disputed) made them counterproductive to his scheme as a matter of law. The district court correctly denied the motion, holding that whether the mailings (with readings included) were so counterproductive to the scheme that they could not fairly be said to have been in its furtherance was a question for the jury.[3] It is that holding, however, that required the court to grant the defendant's request for an odometer tampering instruction. The defendant himself conceded that he had tampered with the odometers. It was therefore a rational possibility that the jury could have convicted the defendant of odometer tampering while acquitting him of mail fraud because it found the mailing of the title forms inimical to the fraudulent car sale scheme. Because this rational possibility existed based on the record assembled at trial, the defendant was entitled to a lesser instruction on odometer tampering.

The test adopted today by the majority for determining the propriety of lesser offense instructions has one virtue: it is the simpler of the two to apply. In the end, though, it disserves the purpose for which such instructions are allowed by separating the inquiry from its proper foundation. That the *Cova* test is more complex is not so much the result of its own inherent difficulty as of the necessary complexity of trials. Where jury instructions are concerned, accuracy has always been the goal, both in the law as

[3] Trial Transcript, p. 114. In his closing argument to the jury, defendant's counsel in fact argued that the mailings actually endangered the scheme to the point where they could not be considered "in furtherance." *Id.* at p. 173.

they state it and in the analysis of their support in trial records. I see no reason, either in Rule 31(c) or elsewhere, to turn to an antiseptic and unworldly formula, one which will, I believe, come to hinder both defense and prosecutorial efforts. Nowhere is this possibility made clearer than in *Cova*, the case that is overruled today. Accordingly I respectfully dissent from the affirmance of the defendant's conviction.

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Amendment: March 4, 1986

February 27, 1986.

Before

WALTER J. CUMMINGS, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
JOEL M. FLAUM, Circuit Judge
FRANK H. EASTERBROOK, Circuit Judge
KENNETH F. RIPPLE, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 84-1317 vs.

WAYNE T. SCHMUCK,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 83 CR 56
Barbara B. Crabb, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellee, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to grant a rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing en banc be, and the same is hereby, GRANTED.

IT IF FURTHER ORDERED that the judgment and opinion entered in this case on November 12, 1985 be, and are hereby, VACATED. This case will be reheard en banc at the convenience of the Court.

The parties are requested to file supplemental briefs on two questions:

1) Whether the inquiry into legislative intent that informs the decision to allow consecutive punishments, see Garrett v. United States, 105 S.Ct.

2407 (1985); United States v. Woodward, 105 S.Ct. 611 (1985); Albernaz v. United States, 450 U.S. 333 (1981); should be used to determine whether one offense is a lesser included or necessarily included offense of another for purposes of Fed. R. Crim. P. 31(c), and if adopted, whether this inquiry has implications to our holding in United States v. Cova, 755 F.2d 595 (7th Cir. 1985).

2) Whether, if this inquiry is employed, odometer tampering (in violation of 15 U.S.C. 1984) is a necessarily included offense of mail fraud (in violation of 18 U.S.C. 1341).

The supplemental briefs shall be filed simultaneously on or before March 19, 1986.

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 12, 19 85.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 84-1317 vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 83 CR 56
Judge Barbara B. Crabb

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

XXVII

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1317

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WAYNE T. SCHMUCK,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 83 CR 56—Barbara B. Crabb, *Judge.*

ARGUED SEPTEMBER 13, 1984—DECIDED NOVEMBER 12, 1985

Before FLAUM, *Circuit Judge*, and SWYGERT and FAIRCHILD, *Senior Circuit Judges.*

SWYGERT, *Senior Circuit Judge.* Defendant Wayne T. Schmuck appeals from his conviction of twelve counts of mail fraud, 18 U.S.C. § 1341 (1982). Because the defendant was improperly denied an instruction on a lesser included offense, we reverse and remand for a new trial.

The defendant concedes that he willfully rolled back odometers in order to sell used cars for inflated prices, a federal misdemeanor. 15 U.S.C. §§ 1984, 1990c(a) (1982). Nevertheless, he was indicted of mail fraud only, a felony, and the district court denied his request that the jury be instructed on the odometer tampering offense as a lesser included offense of mail fraud.

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The mail fraud statute requires a scheme to defraud and some mailing in furtherance of that scheme. According to the indictment and evidence at trial, the underlying scheme to defraud was the defendant's admitted odometer tampering. As for the mailing requirement, it is undisputed that the defendant did not personally use the mails to further his scheme. Rather, the unwitting retailers to whom the defendant sold the cars mailed forms, pursuant to the prevailing practice in Wisconsin, to the Secretary of State that included, *inter alia*, the defendant's fraudulent odometer readings. These forms were necessary to obtain a certificate of title. Without such a certificate, the cars were not marketable to the ultimate consumers.

I

The defendant urges outright reversal of his convictions on two grounds that can be dismissed summarily. First, he argues that no rational trier of fact could find that he used the mails in furtherance of his odometer-tampering fraud. In *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), we held that a rational trier of fact could convict on a mail fraud charge arising from a virtually identical odometer tampering scheme that also entailed the same mailings of forms by third-party retailers. We refuse to overrule that decision.

Second, defendant contends that due process prohibits a mail fraud conviction based on a routine mailing by a third party that the defendant has no power to prevent. One answer is that he can prevent the mailing by abstaining from the fraud. In any event, this court in *Galloway*, 664 F.2d at 161, perceived no due process impediment to holding the same type of mailing a predicate for a mail fraud conviction. Nor did the Supreme Court when it said that a person causes the mails to be used if he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen" even though

use of the mails was not actually intended. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954).

Defendant argues that his convictions violated due process in still another respect because the mail fraud statute does not give fair warning that a fraud which causes a mailing in the manner present here is a violation of the statute. Regardless of what the defendant or any reasonable person might conclude upon reading the mail fraud statute in isolation, the expansive judicial interpretations of the language, going back many years, must be considered with the text, and leave no doubt that a fraud that foreseeably causes a mailing under the present circumstances is an offense.

II

The defendant also urges several grounds for a reversal and remand for a new trial. We need only reach the lesser included offense issue.

Defendant moved in advance of trial for an instruction that would have permitted the jury to find him guilty of odometer tampering. He was entitled to such an instruction if, under these facts, odometer tampering can properly be considered a lesser included offense of mail fraud and if a rational juror could have found him innocent of mail fraud but guilty of odometer tampering. *See* Fed.R.Crim.P. 31(c); *Keeble v. United States*, 412 U.S. 205, 208 (1973).

We find that under these facts odometer tampering is a lesser included offense of mail fraud. It is possible, of course, to commit mail fraud without altering odometers. Apart from the mailing element, the mail fraud statute requires only some "scheme" to defraud. 18 U.S.C. § 1341. The scheme need not concern odometers, and even if it does, it need not be completed. The offense of odometer tampering, on the other hand, is necessarily concerned with odometers, and the tampering must be completed to be punishable under 15 U.S.C. §§ 1984, 1990c(a). This

theoretical possibility of committing the greater offense without committing the lesser offense would be dispositive under the traditional definition of a lesser included offense; the lesser offense would lack the requisite identity of statutory elements with the greater offense. Two circuits continue to follow this traditional definition. *See United States v. Campbell*, 652 F.2d 760, 762 (8th Cir. 1981); *Government of Virgin Islands v. Parrilla*, 550 F.2d 879, 881 (3d Cir. 1977).

This circuit, however, does not follow the traditional definition. Rather than focus on theoretical possibilities, we look to the facts as alleged in the indictment and as proven at trial to determine whether the prosecution relied on proof of all the elements of the lesser offense to prove, in turn, guilt of the greater offense. *See United States v. Cova*, 755 F.2d 595, 597 (7th Cir. 1985); *accord United States v. Zang*, 703 F.2d 1186, 1196 (10th Cir. 1983); *United States v. Johnson*, 637 F.2d 1224, 1238-39 (9th Cir. 1980); *United States v. Whitaker*, 447 F.2d 314, 319 (D.C. Cir. 1971). Thus, it is beside the point that a scheme to defraud *could* have been sufficiently established without proof of all the statutory elements of odometer tampering. What matters is that according to the prosecution's theory of the case, as expressed in the indictment and at trial, the defendant did intentionally cause odometers to be rolled back,[1] thereby satisfying all the elements of the odometer tampering statute.

[1] The prosecution argues that odometer tampering requires a greater degree of specific intent than does mail fraud because the former offense contains the additional element of "wilfulness." This court has recently held that the mental state required by 15 U.S.C. § 1990c is simply intent to commit the prohibited act; the "knowingly and wilfully" language "means exactly what it says rather than contain[s] a hidden requirement." *United States v. Ellis*, 739 F.2d 1250 (7th Cir. 1984). Thus, to be convicted of odometer tampering, the defendant need only intend to roll back odometers. Indeed, because it is not even necessary to show an additional intent to defraud others thereby, the odometer tampering statute actually requires a lesser showing of intent than does the mail fraud statute. *See id.*

XXXI

To be sure, this more flexible definition of a lesser included offense carries with it the potential for abuse. The defendant might confuse the jury by securing instructions on a myriad of crimes only tangentially related to the one charged; as a result, the jury may feel pressured to return a compromise verdict even though it would otherwise be inclined to convict the defendant of the greater offense charged. We therefore join the District of Columbia Circuit in requiring the defendant, when requesting a lesser included instruction, to show some "inherent relationship" between the lesser offense proved and the greater offense charged. *See Whitaker*, 447 F.2d at 319.

An "inherent relationship" exists where the two offenses relate to the protection of the same interests and where proof of the greater offense can generally be expected to require proof of the lesser offense. *Id.* If such is the case, there is little chance that the jury will be confused by the lesser included instruction. Rather, the instruction will alert the jury to its duty to decide not simply whether the defendant is guilty, but what he is guilty of. Where there is such an inherent relationship, the two offenses can properly be viewed as simply two different degrees of the same general crime, and the instruction informs the jury that different degrees of culpability can be ascribed to the defendant's wrongful conduct.

We hold that there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. Both offenses protect against the same kind of societal wrong: fraud. And it can generally be expected that proof of mail fraud will entail proof of a completed underlying "fraud," although this is certainly not always true. *See supra* at 3-4; *cf. Whitaker*, 447 F.2d at 319 (generally, though not invariably, proofs must overlap). Moreover, it is difficult to see how an instruction on the underlying fraud will confuse the jury. Congress has deemed fraud that is perpetrated through the mails to be an especially serious offense, punishable as a felony by as much as five years in jail for each mailing. But a

XXXII

misdemeanor fraud, such as odometer tampering, is deemed less threatening to society and carries a lesser penalty. An instruction on odometer tampering simply informs the jury that the defendant's conduct is less serious if it does not entail a sufficient abuse of the mails to come within the mail fraud statute and encourages the jury to make an informed judgment as to the degree of culpability.

Having found odometer tampering to be a lesser included offense of mail fraud, we turn to the second requirement that must be satisfied in order to be entitled to an instruction on the lesser offense: that a rational trier of fact could have found the defendant innocent of the greater offense, but guilty of the lesser offense. *See Keeble*, 412 U.S. at 208; *United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). The reason for this requirement is to ensure that the instruction is not "merely a device for defendant to invoke the mercy-dispensing prerogative of the jury."[2] *United States v. Sinclair*, 444 F.2d 888, 890 (D.C. Cir. 1971); *accord Medina*, 755 F.2d at 1273; *United States v. Busic*, 592 F.2d 13, 24-25 (3d Cir. 1978). And in a larger sense, this requirement prevents the judge and jury from encroaching on the other's domain. The jury resolves factual issues only; the judge decides the law. To be sure, the jury's decision to convict on the lesser rather than the greater offense should and does indirectly affect the defendant's ultimate punishment, an issue of law. But the jury makes such a

[2] On the other hand, we do not presume to eliminate jury equity; a judge cannot direct a verdict of guilty no matter how strong the evidence. It is proper, however, for the judge to discourage verdicts that disregard—whether intentionally or not—the evidence. As Judge Leventhal pointed out in *Sinclair*, 444 F.2d at 890:

> While a judge cannot eliminate the prerogative a jury retains to disregard his instruction and to acquit on the basis of conjecture rather than reason, the judge is not required to put the case to the jury on a basis that essentially indulges and even encourages speculations as to bizarre reconstructions [of the evidence].

decision only because it finds a factual element of the greater offense lacking; it cannot invade the province of the judge by deciding as a matter of law that, regardless of the facts, conviction of the lesser offense and the attendant lesser punishment are more appropriate.[3] On the other hand, in deciding what a rational juror can and cannot conclude from the evidence, the court should be wary of invading the exclusive factfinding prerogatives of the jury.

As the literal terms of the test indicate, the courts will rarely deem a potential jury finding "irrational." This is in keeping with the policies that underlie the test: the object is merely to discourage the jury from rendering mercy verdicts without invading the jury's province as the ultimate finder of fact. In general, the courts will find irrationality only where the theory of the defense is logically inconsistent with a guilty verdict on the lesser offense or where evidence of such guilt is so slight as not to raise a jury question on the issue. In the first instance, the danger of encouraging jury misconduct is obvious. An illogical verdict is by definition irrational and is probably motivated by factors extrinsic to the evidence at trial—i.e., a desire to render a mercy verdict. Thus, if a defendant in a murder prosecution relies on an alibi defense, he can hardly ask the jury, in the alternative, to convict him of a lesser degree of homicide. Either he is guilty of murder or completely innocent; any other verdict would be an illogical compromise verdict. In such a case, the defendant is not entitled to a lesser included instruction. *E.g., Briley v. Bass*, 742 F.2d 155, 164-65 (4th Cir. 1984).

In the second instance, the courts will refuse to give the lesser instruction not because a verdict of guilty would be illogical or wholly unsupported by the evidence, but because the evidence to sustain the verdict is simply too thin to persuade a rational juror. *See, e.g., Medina*, 755 F.2d at 1273 n.2; *Busic*, 592 F.2d at 24-25; *Sinclair*, 444

[3] *But see supra* note 2.

F.2d at 890. Yet if a rational juror should be expected to return verdicts that are plausible as well as merely logical or merely supported by some scintilla of evidence in the record, courts must take care to allow jurors to choose from a broad range of plausible verdicts. Thus, the courts draw all inferences in favor of finding the potential verdict rational. *See Sinclair*, 444 F.2d at 890. Where the verdict would require a bizarre or overly imaginative reconstruction of events, the verdict is irrational. *See id.* The classic example is where a defendant is found in possession of more than a ton of marijuana and is charged with possession with intent to distribute. Although it is possible that the defendant had no intent to distribute, such a possibility is so improbable that an instruction on the lesser offense of simple possession is improper. *E.g., United States v. Silla*, 555 F.2d 703, 706-07 (9th Cir. 1977).

Turning to the case at bar, an acquittal of mail fraud would have been logically consistent with a conviction of odometer tampering. Such a verdict would follow from a finding that the mailings were not sufficiently in furtherance of the underlying fraud to justify a mail fraud conviction.

As for the requirement that the verdict be rational and plausible as well as logical, such a conclusion of the mailings issue would have been substantially supported by the record evidence. This is not a case where the defendant presented little or no evidence on point. *Cf. Busic*, 592 F.2d at 25 (it is not enough that the defendant formally contested the existence of the additional element distinguishing the greater offense from the lesser; "[t]he contest must be real"). Indeed, the defendant rested his entire defense on the theory that the mailings element was lacking. The jury could have rationally and plausibly concluded that mailings by third-party retailers who were not under the control of the defendant did not sufficiently further the fraud to justify a conviction. True, the mailing of fraudulent odometer readings allowed the unwitting retailers to gain the certificate of title necessary to market the cars, which in turn encouraged them to con-

tinue to do business with the defendant. Yet the jury could have plausibly concluded that, on balance, the mailings were counterproductive to the fraud because they brought the fraudulent odometer readings to the attention of the authorities.

Alternatively, the jury could simply conclude that, aside from the counterproductive effect of the mailings, the mailings were too tangential to the success of the scheme to be deemed "in furtherance" of the scheme. Although the mailings here may have "furthered" the scheme in the literal sense of the word, it is clear that the statute requires something more. For in the modern economy, it is difficult to imagine a transaction that does not at some point involve some tangential use of the mails by some party at least remotely related to the defendant. Lest all fraud be subsumed by the mail fraud statute, the courts require that the mailings further the fraud in the sense that it is at least incidental to an essential element of the fraud. *United States v. Lea*, 618 F.2d 426, 430 (7th Cir.), *cert. denied*, 449 U.S. 823 (1980).

Whether the retailers' ability to secure title was essential to the defendant's scheme and whether the mailings of odometer readings to obtain such title were incidental to that end are questions for the jury. These are issues that involve difficult line-drawing problems; this is not a case where a conviction on the lesser offense would require bizarre or overly-imaginative inferences from the evidence. *See Silla*, 555 F.2d at 706-07; *Sinclair*, 444 F.2d at 890.

It is true that in *Galloway*, 664 F.2d at 161, we stressed that a jury could rationally convict on virtually identical facts. But we did not hold the opposite verdict to be irrational; we simply pointed out that the mailings issue was one for the jury to decide. Consistent with *Galloway*, we now hold that the jury could have rationally reached either verdict. Mailings by third parties not under the control of the defendant that indirectly, if at all, further the underlying fraud may or may not be sufficiently "in furtherance" of the fraud to justify a mail fraud conviction;

the issue is one of fact, and the two opposite conclusions are both sufficiently plausible to be within the purview of the jury's rational discretion.

III

Because the defendant was entitled to an instruction on odometer tampering, we reverse his convictions and remand for a new trial. Circuit Rule 18 shall not apply.

FAIRCHILD, *Senior Circuit Judge*, concurring in part, dissenting in part.

I concur in Part I, but respectfully dissent from Parts II and III. Even if we assume the adherence of this Circuit to the doctrine of *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), relaxing the traditional concept of a lesser included offense, I do not find an inherent relationship between odometer alteration and mail fraud.

The elements of mail fraud, 18 U.S.C. § 1341, relevant to this case are (1) having devised a scheme to defraud and (2) knowingly causing mail delivery of matter for the purpose of executing the scheme. No particular fraudulent act need have been accomplished, although as in the present case, the devising of the scheme is very commonly proved by showing particular instances of fraudulent conduct and inferring the scheme from the conduct. Such conduct may be criminal under state or federal law but need not be. In the present case it happens to be a federal offense. Defendant's devising a scheme to defraud was established by proof that he had caused odometers to be altered on many automobiles he had acquired and later sold including those to which the twelve mailings related. Under the traditional test of comparing statutory elements, knowing and willful alteration of an odometer is not an element necessarily included in mail fraud.

Moreover, one cannot spell out of the present indictment a charge that defendant knowingly and willfully caused the alteration of the odometer on any particular automobile. Any implication to that effect arises from the fact that each count alleges the mailing, by a dealer, of an application for title for a specified automobile, and charges that defendant caused each mailing for the purpose of executing the scheme.

At trial, in order to prove the creation of the scheme and the relationship of each mailing, the Government proved that the odometer on the particular vehicle was one of those which defendant had caused to be altered. It is this evidence which affords the basis for defendant's claim that the jury should have been told that on each count it could convict him of odometer alteration if not convinced that the mailings furthered the scheme.

The leading case relaxing the traditional test for a lesser included offense is *United States v. Whitaker*, 447 F.2d 314. That opinion, at page 319, states the rule as follows:

> A more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. This latter stipulation is prudently required to foreclose a tendency which might otherwise develop towards misuse by the defense of such rule. In the absence of such restraint defense counsel might be tempted to press the jury for leniency by requesting lesser included offense instructions on every lesser

crime that could arguably be made out from any evidence that happened to be introduced at trial.

(Footnote omitted.) The part of the *Whitaker* test which is so clearly lacking in the present case is that the two offenses "must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense."

I think that no such close relationship exists between the offenses of odometer alteration and mail fraud.

In *Whitaker*, itself, the offense charged was burglary and the court found that unlawful entry was an included offense where proved even though burglary could occur after an authorized entry.

In *United States v. Pino*, 606 F.2d 908 (10th Cir. 1979), the offense charged was involuntary manslaughter while driving a motor vehicle in an unlawful manner without due caution and the court held that careless operation of a vehicle was an included offense where proved.

In *United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980), the offense charged was assault resulting in serious bodily injury and the court held that assault with a dangerous weapon with intent to do bodily harm was an included offense where proved.

In *United States v. Stolarz*, 550 F.2d 488 (9th Cir.), *cert. denied*, 434 U.S. 851 (1977), the offense charged was assault with intent to commit murder and the court held that assault with a dangerous weapon with intent to do bodily harm was an included offense where proved.

In *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985), the offense charged was conspiracy to distribute cocaine and this court held that conspiracy to possess cocaine was an included offense.

The facts of all these cases demonstrate a much closer relationship between the offense not charged but proved in the course of trial and the offense charged than can

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be discerned between odometer alteration and mail fraud. It seems fair to say that in each case the offense found to be lesser included comes within a hair's breadth of fulfilling the traditional test of comparing statutory elements.

In *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1983), the Tenth Circuit held that there was no inherent relationship between the offense incidentally proved and the offense charged. The defendant had sought a lesser included offense instruction as to violation of EPA Certification Regulations. The charged offenses were conspiracy, mail fraud and racketeering.

There is apparently no case holding that fraudulent conduct which happens to constitute a federal offense and is proved in establishing the elements of mail fraud is included within mail fraud. Indeed, I would suppose that if properly charged, a defendant could be convicted of both odometer alteration and mail fraud and the punishments could be cumulative.

Going on to another point, even if the lesser offense is included in the greater, the evidence must "permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater" before defendant is entitled to an instruction on the point. *Keeble v. United States*, 412 U.S. 205, 208 (1973); *United States v. Busic*, 592 F.2d 13, 24-25 (2nd Cir. 1978). With all respect, I do not believe that the evidence and concessions made by defendant in this case leave open any issue of fact as to mailings furthering the scheme. The scheme proved was clearly an ongoing course of business. There was proof that defendant admitted altering odometers on a great many cars over a substantial period of time. In the proof of the twelve counts it was shown that one dealer who bought from defendant made four successive purchases and mailed applications for each of them in order to obtain titles in the names of his customers. Another dealer made five successive purchases and similar mailings.

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Beyond any doubt, the mailings not only furthered, but were essential to the continued success of the scheme.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 6004—Midwest Law Printing Co., Inc., Chicago—11-12-85—150

XLI

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,	INDICTMENT
vs.	
WAYNE T. SCHMUCK,	18 U.S.C. [illegible]
Defendant.	

THE GRAND JURY CHARGES:

COUNTS ONE
THROUGH THIRTEEN

1. At all times pertinent to this indictment, WAYNE T. SCHMUCK did business in the name of Big Foot Auto Sales, located in Harvard, Illinois.

2. From on or about July 1, 1979 and continuing until on or about July 30, 1980, the defendant,

WAYNE T. SCHMUCK

did devise and intend to devise a scheme to defraud persons in the State of Wisconsin (hereinafter referred to as "Wisconsin customers"), who would be and were induced to purchase automobiles from Wisconsin automobile dealers (hereinafter referred to as "Wisconsin dealers"), on which WAYNE T SCHMUCK had caused the odometer mileage readings to be altered so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile.

3. It was a part of this scheme that WAYNE T. SCHMUCK would and did in the course of his business purchase used automobiles from individuals and auto

XL.II

auctions in Illinois, Wisconsin, and elsewhere, for resale to various persons, including automobile dealers in Wisconsin.

4. It was further a part of the scheme that WAYNE T. SCHMUCK would cause the odometer mileage reading to be altered on many of the used automobiles which he intended for resale so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile.

5. It was further a part of the scheme that WAYNE T. SCHMUCK would and did prepare an odometer mileage statement for each of the automobiles referred to in paragraph 4 on which was entered the odometer mileage reading as WAYNE T. SCHMUCK had caused it to be altered.

6. It was further a part of the scheme that WAYNE T. SCHMUCK would offer these automobiles to purchasers at the used car lot of Big Foot Autos in Harvard, Illinois, including autombile dealers from the State of Wisconsin.

7. It was further a part of the scheme that Wisconsin dealers purchasing each automobile would and did pay WAYNE T. SCHMUCK for the automobile and that WAYNE T. SCHMUCK would and did provide each Wisconsin dealer with an original odometer mileage statement reflecting the mileage as WAYNE T. SCHMUCK had caused it to be altered.

8. It was further a part of the scheme that the Wisconsin dealers would offer these automobile in Wisconsin for sale to Wisconsin customers (or, in some instances, to other Wisconsin dealers) and that the Wisconsin dealers would and did prepare an odometer mileage statement for each of the automobiles on which was entered the mileage as it appeared on the automobile odometer, which,

because WAYNE T. SCHMUCK had caused it to be altered, did not reflect the true and correct mileage for that automobile.

9. It was further a part of the scheme that in purchasing each of these automobiles, the Wisconsin dealers and the Wisconsin customers would and did rely on the false odometer mileage reading as it appeared on the automobile odometer and on the odometer mileage statements provided by WAYNE T. SCHMUCK and further that the Wisconsin dealers and Wisconsin customers would and did pay more for each automobile than would have been paid if the odometer mileage reading had not been altered.

10. It was further a part of the scheme that each Wisconsin dealer who purchased an automobile from WAYNE T. SCHMUCK would and did submit a Wisconsin title application form to the Wisconsin Department of Transportation, Bureau of Vehicle Registration and Licensing, in order to obtain a Wisconsin title in the name of the Wisconsin dealer or on behalf of and in the name of the Wisconsin customer.

11. On or about the dates set forth below, in the Western District of Wisconsin, the defendant,

WAYNE B. SCHMUCK,

for the purpose of executing this scheme, did cause to be delivered by mail according to the direction thereon, mail matter to be sent and delivered by the United States Postal Service, to the Wisconsin Department of Transportation, Bureau of Vehicle Registration and Licensing, 4802 Sheboygan Avenue, Madison, Wisconsin, from the Wisconsin dealer indicated, containing in each instance a Wisconsin title application form pertaining to a particular automobile described below:

Received
Transferred

COUNT	APPROXIMATE DATE OF MAILING	WISCONSIN DEALER	AUTOMOBILE DESCRIPTION AND SERIAL NUMBER
1.	July 25, 1979	Cameron Auto Sales 7-19 Returned 7-21 Transferred Cameron, Wisconsin	1973 Chevrolet 1Y17K3W156990
2.	September 26, 1979	Southside Auto 6-80 Cameron, Wisconsin 9-10	1977 Chevrolet CCL447J129679
3.	November 8, 1979	P and A Sales 11-7-79 Bloomer, Wisconsin 8-10	1977 Mercury 7274A602435
4.	February 18, 1980	Southside Auto 2-20-80 Cameron, Wisconsikn	1977 Chevrolet CKR247F325035
5.	February 27, 1980	Grass Motor Sales 2-29-80 Bloomington, Wisconsin	1977 Buick 4V69K7H514944
6.	March 21, 1980	P and A Sales 3-17-80 Bloomer, Wisconsin	1978 Ford 8P63H127461
7.	March 31, 1980	P and A Sales 3-27-80 Bloomer, Wisconsin	1973 Chevrolet CCY243J126096
8.	May 27, 1980	P and A Sales 5-17-80 Bloomer, Wisconsin	1975 Ford F10GLW04097
9.	May 5, 1980	P and A Sales 5-5-80 Bloomer, Wisconsin	1975 Ford 5G21H139390
10.	June 9, 1980 6-24-80 6-27-80	Hi Way Service Garage Marshfield, Wisconsin	1975 Ford 5X11Y215161
11.	June 27, 1980	Southside Auto 5-4-80 Cameron Wisconsin 6-23-80	1977 Dodge NH45C7B100810
12.	July 2, 1980	Southside Auto 6-30-80 Cameron, Wisconsin 6-4-80	1977 Dodge NL41C7F292674

(All in violation of Title 18, United States Code, Sections 1341 and 2.)

A TRUE BILL

FOREMAN

JOHN R. BYRNES, United States Attorney

Indictment returned: 11-1-83

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CLERK'S OFFICE 83-CR-56-C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

v.

WAYNE T. SCHMUCK,

Defendant.

ORDER
83-CR-56-C

- -

Defendant has moved to dismiss the indictment against him on the ground that it fails to allege facts which would support a conviction under 18 U.S.C. §1341.[1/]

Defendant contends that the indictment is deficient in failing to set out specifically that the mailings which were alleged to be in furtherance of defendant's scheme did not endanger the success of defendant's scheme. Defendant argues that such an allegation is necessary in view of the holding of the United States Supreme Court in United States v. Maze, 414 U.S. 395 (1973), to the effect that mailings which actually enhance the probability of detection are not within the purview of the statute.

Defendant is correct in his understanding that a conviction could not stand if it were based upon mailings that did not actually "further" the scheme to defraud. However, that is a matter to be determined at trial. The indictment is sufficient if it merely alleges that the mailings were caused by the defendant for the purpose of executing the scheme. The indictment in this case includes the

1/ Defendant has also moved to dismiss on the ground that the indictment fails to charge an offense under 18 U.S.C. §1342. Since the indictment does not purport to charge an offense under this section but, rather, under §§1341 and 2, I have not considered defendant's arguments in this regard.

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Copy of this document has been mailed this 14 day of Nov, 1983
By Deputy Clerk

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requisite allegations.

ORDER

Defendant's motion to dismiss the indictment against him is DENIED.

Entered this 11th day of November, 1983.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

v.

WAYNE T. SCHMUCK,

Defendant.

FINAL PRETRIAL CONFERENCE ORDER
83-CR-56-C

- -

A final pretrial conference was held in this case on December 15, 1983, before United States District Judge Barbara B. Crabb. Plaintiff appeared by John Vaudreuil. Defendant appeared in person and by counsel, Harry Saltzburg. Also present was Peter Steinberg.

Counsel agreed to the voir dire questions in the form given to counsel at the conference.

Defendant's motion for the giving of an instruction on a lesser included offense was denied. Defendant's motion to let the jury decide whether the mailings in this case further the offense was granted. Defendant's motion to give his requested theory of defense instruction was denied on the ground that the proposed instruction did not incorporate a theory of defense.

Defendant noted that he opposed the government's request for the giving of an instruction on either joint venture or aiding and abetting and that he opposed the giving of an instruction on disagreement among jurors. A decision on the giving of an instruction either on joint venture or aiding and abetting was

reserved until the close of evidence in the trial. The defendant's objection to the giving of the instruction on disagreement among jurors was overruled.

Entered this 16th day of December, 1983.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

v.

WAYNE SCHMUCK,

Defendant.

ORDER
83-CR-56

- -

Defendant has moved for a judgment of acquittal or, in the alternative, for a new trial. In support of the motion defendant contends that it was error to fail to instruct the jury on the lesser-included offense of odometer tampering and to allow in evidence of odometer tampering on cars other than those charged in the indictment. Also defendant contends that in prosecuting this case as a mail fraud which is a felony rather than as odometer tampering which is a misdemeanor, the United States Attorney has usurped the function of Congress.

For the reasons stated on the record during the course of the trial and in the pretrial proceedings, I find no merit in the first two grounds raised by defendant. The third ground, raised here for the first time, is unpersuasive. The Court of Appeals for the Seventh Circuit has upheld convictions for mail fraud on the same set of facts, see United States v. Galloway, 664 F.2d 161 (7th Cir. 1981). Moreover, there is nothing in the mail fraud statute that prevents a prosecutor from using it against persons who benefit from the use of the mails to further their odometer tampering schemes. The fact that Congress has made the act of odometer tampering a federal crime does not mean that Congress did not believe the use of the mails to carry out a whole scheme to defraud by odometer tampering cannot also be a federal crime. The focus in the

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first instance is upon the tampering itself; in the second instance, it is upon the criminal use of the mails.

ORDER

IT IS ORDERED that defendant's motion for acquittal or, in the alternative, for a new trial, is DENIED.

Entered this 29th day of December, 1983.

BY THE COURT:

Barbara B Crabb

BARBARA B. CRABB
District Judge

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United States of America vs

DEFENDANT: WAYNE T. SCHMICK

United States District Court

THE WESTERN DISTRICT OF WISCONSIN

DOCKET NO. 83-CR-56-C

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL: In the presence of the attorney for the government, the defendant appeared in person on this date February 24 19

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

X WITH COUNSEL Harry Salzberg
(Name of Counsel)

PLEA: ___ GUILTY, and the court being satisfied that there is a factual basis for the plea ___ NOLO CONTENDERE X NOT GUILTY

FINDING & JUDGMENT: There being a XXXXX verdict of ___ NOT GUILTY. Defendant is discharged
X GUILTY.

Defendant has been convicted as charged of the offense(s) of **frauds and swindles, in violation of Title 18, U.S.C. §1341, and fictitious name or address, U.S. Postal Service, in violation of Title 18, U.S.C. §1342.**

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 90 days on Count I. It is recommended that work release privileges not be granted during the period of confinement.

As to each of Counts II through XII, it is adjudged that the defendant pay a fine to the United States of $50 and the imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of four (4) years, under the terms and conditions of the court set forth in Appendix A, attached hereto; said probation on each count to run concurrently; said period of probation to commence upon release from physical custody on Count I of the Indictment. The fines are to be paid within six (6) months of the termination of the probation period.

SPECIAL CONDITIONS OF PROBATION: It is ordered that execution of the sentence is stayed pending the outcome of the appeal in this case. The present conditions of release are continued pending appeal

ADDITIONAL CONDITIONS OF PROBATION: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant, revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends.

A TRUE COPY. Certified this 27 day of Feb, 19 84.

Joseph W. Skupniewitz, Clerk
By _____
Deputy Clerk

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
X U.S. District Judge
___ U.S. Magistrate

Barbara B Crabb

February 24, 1984

APPENDIX A TO JUDGMENT AND PROBATION/COMMITMENT ORDER

The defendant is placed on probation for a period of Four (4) year upon the following terms and conditions:

(1) Defendant shall refrain from violation of any law (federal, state, and local), and shall get in touch immediately with defendant's Probation Officer if arrested or questioned by a law enforcement officer.

(2) Defendant shall associate only with law-abiding persons and maintain reasonable hours.

(3) Defendant shall work regularly at a lawful occupation and support defendant's legal dependents, if any, to the best of defendant's ability. When out of work defendant shall notify defendant's probation officer at once. Defendant shall consult defendant's probation officer prior to job changes.

(4) Defendant shall not leave the judicial district without permission of the probation officer.

(5) Defendant shall notify defendant's probation officer immediately of any change in place of residence.

(6) Defendant shall follow the probation officer's instructions and advice.

(7) Defendant shall report to the probation officer as directed.

(8) If the offense of which defendant has been convicted in this case is punishable by imprisonment for a term exceeding one year, or if the defendant has ever been convicted in any federal court or in any court of any state or in any court of any political subdivision of any state of an offense punishable by imprisonment for a term exceeding one year, then the defendant shall not receive, possess, or transport in commerce or affecting commerce any firearm, as defined in 18 U.S.C. §921(a)(3), including any hand gun, rifle, or shotgun.

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NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WAYNE T. SCHMUCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Petitioner Wayne T. Schmuck, by and through his Counsel, Peter L. Steinberg, and respectfully prays this Honorable Court for the entry of an order granting Petitioner leave to proceed in forma pauperis in the above entitled petition for writ of certiorari, and appointing his present counsel to appear on his behalf in the event that his petition is granted, pursuant to Rule 46 of the Supreme Court Rules, 28 U.S.C. § 1915, and 18 U.S.C. § 3006A.

As grounds for this motion petitioner shows the following:

1. He was previously granted leave to proceed on appeal by the District Court in this case, and counsel was appointed to represent him, as shown by the attached Order of March 9, 1984, which is incorporated herein by reference,

2. He desires review of the decision of the Court of Appeals in his case, but due to his poverty is unable to pay the necessary costs and expenses of the present writ.

This motion is made in good faith and not for purposes of delay.

Dated: February 11, 1988.

Respectfully submitted,

Peter L. Steinberg

Peter L. Steinberg
Counsel for Wayne T. Schmuck
6 Bigelow Street
Cambridge, Mass. 02139
Tel. (617) 547-8557

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

ORDER
83-CR-56-C

v.

WAYNE T. SCHMUCK,

Defendant.

- -

Defendant has moved for leave to proceed on appeal in forma pauperis, for appointment of counsel to represent him on appeal, for preparation of the transcript of the proceedings at government expense, and for release of the order of this court requiring him to pay $1000 toward the cost of his trial representation in monthly installments of $100.

Leave to proceed on appeal in forma pauperis is GRANTED.

It is not necessary to order appointment of Harry E. Salzberg as counsel in this case as Mr. Salzberg was appointed to represent defendant in the criminal proceedings in this case and he is counsel of record for defendant unless and until he is relieved of that representation by the Court of Appeals for the Seventh Circuit.

In a separate order I have directed preparation of a transcript of the proceedings in this case at government expense.

With respect to defendant's release from the order of this court requiring him to make payments toward the cost of his trial representation, I am satisfied from a review of the presentence report in this case that defendant is without the financial resources to comply with that order. Defendant's ability to pay has been substantially changed by the loss of his job following his conviction in

this case on December 20, 1983. Therefore, IT IS ORDERED that the order of the magistrate dated September 14, 1983, and modified September 22, 1983, is vacated with respect to the provision that defendant pay $1000 toward the cost of his trial representation in monthly installments of $100.

Entered this 9th day of March, 1984.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
District Judge

NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WAYNE T. SCHMUCK,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

ENTRY OF APPEARANCE

Please take notice that the undersigned Peter Lewis Steinberg, being a Member of the Bar of this High Court, admitted January 19, 1981, hereby enters his appearance in the above entitled matter on behalf of, and at the request of, Petitioner Wayne T. Schmuck. The undersigned previously appeared as co-counsel for petitioner at trial before the District Court and before the United States Court of Appeals, and presented both oral arguments on petitioner's behalf.

Dated: February 11, 1988.

Respectfully submitted,

Peter L. Steinberg
Counsel of Record for
Petitioner Wayne T. Schmuck
6 Bigelow Street
Cambridge, Mass. 03129

Tel. (617) 547-8557

NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

WAYNE T. SCHMUCK,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE.

I, Peter L. Steinberg, hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court, that the attached Entry of Appearance, Motion For Leave To Proceed In Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit were duly served upon the following persons by depositing a single copy thereof with the United States Post Office in Cambridge, Massachusetts, first class postage prepaid, addressed to:

John R. Byrnes
United States Attorney, Western District of Wisconsin
John W. Vaudreuil
Assistant United States Attorney
U.S. Court House, Room 420
120 N. Henry Street
Madison, Wisconsin 53703

and

Solicitor General,
Department of Justice
Washington, D.C. 20530

this 11th day of February, 1988.

I further certify that all parties required to be served

have been served, and their names and addresses are listed above, and that I am a member of the Bar of this Honorable Court, and my entry of appearance in the present case is attached hereto.

Dated: February 11, 1988

Respectfully submitted,

Peter L. Steinberg

Peter L. Steinberg
Counsel of Record for
Petitioner Wayne T. Schmuck
6 Bigelow Street
Cambridge, Mass. 03129

Tel. (617) 547-8557